Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66
Petitioner,

v.

HOUSTON LIGHTING AND POWER COMPANY, a Subsidiary of HOUSTON INDUSTRIES, INC., as successor in interest to UTILITY FUELS, INC.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
No. 94-20693

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The fundamental question presented for review by this case is whether or not the United States Court of Appeals for the Fifth Circuit has issued a Decision in direct conflict with long-standing precedent of this Court by virtue of the manner in which the Fifth Circuit went about analyzing and resolving the question of whether or not an underlying Arbitration Award should be enforced or vacated?

2. This case presents the corresponding question for review as to whether or not the United States Court of Appeals for the Fifth Circuit, under the guise of determining whether or not an Arbitrator "exceeded his authority" in issuing an Arbitration Award under a Collective Bargaining Agreement, in effect exceeded its authority, and thereby usurped the authority of the Arbitrator?

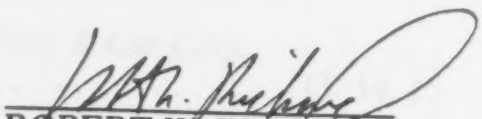
3. This case also presents for review the question of whether or not a Federal Court should, in considering the question of whether to enforce or vacate an Arbitration Award arising out of a Collective Bargaining Agreement, indulge in extensive analysis of the Collective Bargaining

Agreement, including the contractual provisions involved in the underlying Arbitration Award, or whether the Court should in fact limit its analysis to a consideration of the question of whether the Award "draws its essence" from the Collective Bargaining Agreement, and limit its contractual review to only such part of the Collective Bargaining Agreement that addresses the authority of the Arbitrator?

LIST OF ALL PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

HOUSTON LIGHTING & POWER CO.	- Respondent
HOUSTON INDUSTRIES, INC.	- Parent Company
UTILITY FUELS, INC.	- Respondent
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66	- Petitioner
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	- Parent Organization
SAM THORNAL	- Grievant



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LIST OF OPINIONS

1. Decision issued on December 11, 1995 in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, No. 94-20693 in the United States Court of Appeals for the Fifth Circuit.

2. Order denying Petition for Rehearing issued on January 8, 1996, in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, No. 94-20693 in the United States Court of Appeals for the Fifth Circuit.

3. Final Order issued by Judge Norman W. Black on August 25, 1995, in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, Civil Action No. H-94-908 in the United States District Court for the Southern District of Texas, Houston Division.

4. Arbitration Award issued by Arbitrator Otis H. King on December 31, 1993 in No. A 70 300 0033 93; *Utility Fuels, Inc. -and- International Brotherhood of Electrical Workers, Local 66, AFL-CIO.*

STATEMENT OF JURISDICTION

This case seeks the review of a Decision of the United States Court of Appeals for the Fifth Circuit entered on December 11, 1995. The Petitioner filed a timely Petition for Rehearing, which Petition was denied on January 8, 1996. The underlying lawsuit was originally instituted in the United States District Court for the Southern District of Texas, under the auspices of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, seeking to set aside an Arbitration Award issued through the operation of a grievance procedure contained within a Collective Bargaining Agreement. This being a case instituted under the Labor Management Relations Act, seeking to set aside an Arbitration Award, it is one over which the Federal Courts have jurisdiction in the first instance, and over which this Court has jurisdiction to review by Writ of Certiorari.

APPLICABLE STATUTES

1. Section 301 of the Labor Managment Relations Act, 29 U.S.C. §185 (See Appendix 5).
2. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d) (See Appendix 6).

STATEMENT OF THE CASE

This case seeks the review of a decision of the United States Court of Appeals for the Fifth Circuit reversing and vacating a Judgment of the United States District Court for the Southern District of Texas enforcing an Arbitration Award. The Fifth Circuit Decision also, in effect, vacated the underlying Arbitration Award, rendered as a result of Arbitration proceedings held between the two parties to a Collective Bargaining Agreement, one of them being the Petitioner, International Brotherhood of Electrical Workers, Local Union No. 66.

In the late Winter and early Spring of 1992, Houston Lighting & Power Company and its sister Company, Utilities Fuels, Inc. both subsidiaries of Houston Industries, Inc., undertook and effectuated a very significant layoff of employees. A significant number of the employees laid off by both Companies were covered by Collective Bargaining Agreements then in effect between the Petitioner, International Brotherhood of Electrical Workers, Local No. 66, and the two

Companies.[1] The two Companies devised a method of selecting the individuals covered by the Collective Bargaining Agreements for layoff which the Companies contend complied with the applicable contract language. With regard to the selection of employees for layoff, the Agreement between Utilities Fuels and Local 66 provided, in pertinent part, as follows:

> "Section 7. Seniority. After completion of probationary period, seniority shall date from the first date of employment by the Company at that facility, except where an employee resigns or is discharged for just cause and is later re-employed, then seniority shall date from the last date of employment at that facility. In the event of promotions, layoffs, or a permanent reduction in the working force at a facility,

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[1] The Petitioner Union was party to separate Collective Bargaining Agreements with Houston Lighting & Power and Utilities Fuels. However, the operative language relevant to the issues presented to the Arbitrator, and the proceeding before this Court, was substantively identical, and the manner in which the two Companies went about conducting the layoff, related to this contractual language, was also substantively identical.

where ability, skill and qualifications are equal, length of service at that facility shall govern. Employees covered by this Agreement who are laid off will be given first consideration for re-employment for positions covered by this Agreement, subject to the Company's determination of ability, skills and qualifications, for a period of one year after the layoff effective date. When Company determines to transfer employees form one location to another, Company will request volunteers and select the senior volunteers where ability, skill and qualifications are equal; if there are not sufficient volunteers with the required ability, skill and qualifications, Company will select the employees with the least seniority where ability, skill and qualifications are equal. The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Substantively identical language was contained in the Petitioner Union's Contract with Houston Lighting &

Power. The two Companies, in determining which employees to select for layoff, devised a scheme whereby every member of the Bargaining Unit was evaluated by Management, through the utilization of a "Special Performance Profile", and then, based upon the results of the evaluation, each employee was placed in one of three categories: "Above Average", "Average", or "Marginal". Employees were then selected for layoff utilizing seniority within each classification or grade, so that employees first in the "Marginal" category were laid off, in inverse order of seniority, and then, if necessary, employees in the "Average" category, and so on.

As a result of the manner in which employees were selected for layoff, the Petitioner Union filed a large number of Grievances against the two employers on behalf of laid off employees, contending, essentially, that their selection for layoff violated the Collective Bargaining Agreement, and these employees' seniority rights under the Agreement. One of the employees for whom the Union filed such a Grievance was Sam Thornal, a Heavy Equipment Operator employed by Utility Fuels, Inc. at Houston Lighting & Power's electric generating station in Limestone, Texas. Thornal, the most senior Heavy Equipment Operator at the Limestone facility employed

by Utility Fuels, had been laid off, based upon his "Marginal" rating received as a result of the Special Performance profiling process. The Grievance of Sam Thornal was ultimately presented to Arbitrator Otis H. King, pursuant to the parties' Grievance and Arbitration procedure, on June 17, 1993. This was the first case heard by an Arbitrator involving an employee laid off by Utility Fuels, Inc. At the Hearing, the Union raised two basic contentions: First, that the entire process utilized by the Company to select employees for layoff violated the Collective Bargaining Agreement, and requesting that the entire layoff be set aside, and secondly, even if the overall process utilized by the Company did not violate the Agreement, that the process as applied to the Grievant, Sam Thornal, did violate the Agreement. In essence, the second contention of the Union was an individual claim regarding the Grievant, Sam Thornal, and contending that the performance profile process as applied to the Grievant had produced an inaccurate result; in effect, the Union contended that Thornal was equal to or better than, in terms of "ability, skills and qualifications" other Heavy Equipment Operators with lesser seniority than Thornal who had not been laid off.

Arbitrator King considered all of the evidence and arguments of the parties, and issued a Decision and Arbitration Award on December 31, 1993. In his Award, Arbitrator King rejected the Union's first argument, and concluded that the process itself was not facially violative of the Contract. However, Arbitrator King sustained the Grievance with regard to the individual Grievant, Sam Thornal, finding that in fact the Grievant Thornal was at least equal to or better than, in terms of "ability, skills and qualifications", at least one Heavy Equipment Operator with less seniority than Thornal who had not been laid off. As a result of this conclusion, Arbitrator King ordered that Thornal be reinstated to his position, with full back pay.

On March 18, 1994 Houston Lighting & Power Company filed a lawsuit against the Petitioner Union in the United States District Court for the Southern District of Texas, seeking to set aside Arbitrator King's Award.[2]

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[2] By the time the lawsuit was filed, Sam Thornal's former employer, Utilities Fuels, Inc., no longer existed. It had been absorbed into Houston Lighting & Power in a corporate reorganization, and all employees of Utilities Fuel had been absorbed in and become employees of Houston Lighting & Power.

On August 25, 1994, United States District Judge Norman W. Black, Chief Judge of the Southern District of Texas, issued an Order granting Summary Judgment in favor of the Union, and denying the Summary Judgment Motion of the Company, and enforcing Arbitrator King's Award. Thereafter, on September 13, 1994, Houston Lighting & Power filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. Briefs were filed, and the case was presented for oral argument before a three-judge panel in New Orleans, Louisiana on May 4, 1995. Subsequently, on December 11, 1995, the Panel issued a Decision reversing the Decision of the District Court, and vacating that Decision, and the Arbitration Award. The Majority Opinion was written by Judge DeMoss, joined in by Judge Duhé, with Judge Lay, sitting by designation out of the Eighth Circuit Court of Appeals, dissenting.

The Petitioner Union filed a timely Petition for Rehearing on December 26, 1995. The Petition for Rehearing was denied by the Fifth Circuit on January 8, 1996. The Petitioner Union now asks this Court to grant this Petition for Writ of Certiorari, based upon the Union's well considered and good faith belief that the Fifth Circuit's Opinion directly conflicts with numerous

Opinions of other Circuit Courts, and with long-standing precedent of the United States Supreme Court regarding the role of the Court in reviewing and enforcing Arbitration Awards in the Collective Bargaining Agreement context. The Union believes that the Fifth Circuit Opinion, if allowed to stand, will likely have the effect of seriously undermining grievance and arbitration procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit.

ARGUMENT

Any basic review of federal labor law, and of the many decisions of the Federal Courts, including this Court, on the issue, should lead one to the conclusion that there can be no question but that arbitration is the favored method of resolving labor disputes. Section 203(d) of the Labor Management Relations Act of 1947, as amended, states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (29 U.S.C. §173(d)).

The foregoing provision, in and of itself, manifests a clear congressional intent to allow, and in fact encourage parties to collective bargaining agreements to resolve their disputes through an arbitral process.

Consistent with that congressional policy, this Court first held, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, vested jurisdiction in the federal district courts to enforce

agreements to arbitrate and arbitration awards. Moreover, the Court's Opinion in *Lincoln Mills* served as a mandate to all federal courts to fashion a body of substantive law that would effectuate this congressional policy. Three years later, in the famous "*Steelworkers Trilogy*",[3] the Court further refined the appropriate role of the courts in actions brought to enforce agreements to arbitrate and to enforce arbitration awards. The Court made direct reference to Section 203(d) and the policy expressed therein, and then stated:

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers v. American Manufacturing Company*, *supra*, at 565.

American Manufacturing Company involved an action to enforce an agreement to arbitrate, but in a companion case, this Court discussed the role of the Court in actions

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[3] *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 565 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 595 (1960).

brought to enforce arbitration awards. The essence of the Court's statement was that the courts should stay away from the merits of the dispute, and undertake only a very limited role:

> "The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* ante. . . . decided this day, the arbitrators under these collective agreements are indispensable agencies in the continuous collective bargaining process. They sit to settle disputes at the plant level -- disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *Steelworkers of America v. Enterprise Wheel & Car Corp., supra.* at 595.

As indicated by the foregoing opinion of this Court, the role of the federal courts in an action seeking to vacate or set aside an arbitration award is, indeed, extremely limited, and any application seeking to have an arbitration award set aside should be granted only in the rarest of circumstances. Clearly, this Court premised its conclusion upon the favored position which arbitration enjoys in the labor relations context, and on the fact that:

> "Arbitration of labor disputes in collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers of America a. Warrior & Gulf Navigation Co., supra.* at 578.

In the more than three and one-half decades that have passed since this Court first issued its Opinion in the "*Steelworkers Trilogy*", no decision has emanated from this Court that would in any way suggest that the principles enunciated by this Court in the *"Steelworkers Trilogy"* are not still the law of the land. To the contrary, any decision issued by this Court over the years, such as *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), have consistently reaffirmed the teachings of the *Steelworkers Trilogy*. Moreover, countless opinions of

Federal Circuit Court over this same period of time have manifested full allegiance to this long-established law.

In this case, however, we have an Opinion that violates the most fundamental principle of the long-standing precedent of this Court. In issuing its decision vacating the underlying Arbitration Award, the Fifth Circuit Majority has done the one thing that this Court most vehemently warned against: The Fifth Circuit Majority has stepped into the role of the Arbitrator, and substituted its judgment for that of the Arbitrator.

While it is true that a cursory reading of the Fifth Circuit Opinion discloses some facial recognition of, and suggested adherence to, the long-standing precedent of this Court and of the Fifth Circuit, a true substantive analysis of the Fifth Circuit Majority Opinion discloses that in fact the Court failed to follow the teachings that it acknowledged to exist. No more apparent is this fact than in the following excerpt from the Fifth Circuit Majority Opinion:

> "Article IV, Section 7 of the Agreement bestows *upon the Company* the right to determine an employee's ability, skill and qualifications subject to an employee's right to assert a grievance. The phrase 'subject to

> an employee's right to assert a grievance' means that the employee may assert one or both of two contentions: (1) first he may assert that the system and procedures used by the Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement; and/or (2) secondly, he may assert that the Company discriminated against him because of race, color, religion, sex, or national origin in the evaluation process." (See *Houston Lighting & Power Company v. International Brotherhood of Electrical Workers Local Union No. 66* at Page 14). (Appendix 1)

By making the foregoing statement, which fundamentally determined the Majority's ultimate Opinion, the Court in effect substituted its interpretation of the Contract for that of the Arbitrator. It was the Arbitrator that was hired by the parties to resolve the dispute, and interpret the Contract. He did so. It was totally inappropriate for the Fifth Circuit, regardless of whether or not it believed the Arbitrator to be correct in his interpretation, to substitute

its interpretation of the Contract for that of the Arbitrator. See *United Paperworkers International Union v. Misco, Inc., supra.*

There are two fundamental problems with the Majority Opinion of the Fifth Circuit. First, its decision rests upon a gross misinterpretation of the contractual language. Secondly, and more importantly, it was fundamental error for the Fifth Circuit to, under the guise of determining the contractual authority of the Arbitrator, indulge in a fundamental interpretation of the Contract that in fact was an interpretation for the Arbitrator.

Article IV, Section 7 of the underlying Collective Bargaining Agreement provides, in pertinent part, as follows:

> "Section 7. Seniority . . . In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. . . . The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Article II, as referred to in the foregoing provision, provides, in pertinent part:

> "Article II, Section 1. A grievance, as that term is used in this contract, means any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against.
>
> Article II, Section 4. . . . The sole function of the arbitrators shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof."

This case emanates from an underlying grievance filed, as specifically authorized by Section 7 of the Agreement, and in accordance with Article II of the Agreement. The underlying grievance was specifically the grievance contemplated by Section 7 -- a grievance over the Company's "determination" of an employee's "ability, skill and qualifications" in the circumstances of a layoff, and for

the purposes of selecting employees for layoff. This was the grievance submitted to the Arbitrator, Otis King, for resolution, and it was this dispute which the Arbitrator resolved.

While it is true that the initial grievance filed by the Union contained both a broad claim attacking the entire procedure utilized by the Company for determining "ability, skill and qualifications", and the Arbitrator ruled in favor of the Company, and against the Union, on this issue, the grievance also contained the individual claim of the individual grievant, Sam Thornal, who had been laid off out of line of seniority solely as a result of the Company's determination of his "ability, skill and qualifications". The Arbitrator, given this dispute, and applying the clear language of the Contract that "where ability, skill and qualifications are equal, length of service at that facility shall govern", determined that this provision had been violated in the layoff of Sam Thornal, because there was at least one employee of lesser seniority than Thornal who had not been laid off, but with whom Thornal had at least equal "ability, skill and qualifications". All that the Arbitrator did was consider the employee's contest of the Company's determination of his "ability, skill and qualifications", and conclude that the employee

was right, and the Company wrong, with regard to the relative equality of his "ability, skill and qualifications" with comparable employees of lesser seniority who were not laid off. Thus, applying the Contract, the Arbitrator ordered the employee reinstated.

This was neither a complex nor unusual grievance. Yet, the Fifth Circuit took this grievance, and the Arbitration Award, and concluded that somehow the Arbitrator lacked the authority to resolve this dispute. In doing so, the Fifth Circuit grossly misinterpreted the contractual language.

The ultimate conclusion of the Fifth Circuit Majority Opinion is that, while acknowledging that the Contract clearly delineates "an employee's right to assert a grievance" contesting the Company's determination of his "ability, skill and qualifications", asserting that any such grievance could only be brought as "a claim that an employee has been unreasonably and unjustly discriminated against." This interpretation of the Contract by the Fifth Circuit Majority is a complete misreading of Article II, Section 1 of the Agreement, and effectively denied Sam Thornal, and potentially any other employee covered by this Agreement, the right to present a grievance over "the proper application or interpretation of

this Agreement". Clearly, Thornal and the Union had the right to "assert a grievance under Article II", and this necessarily means the entirety of Article II. In this regard, Article II clearly contemplates two types of grievances: First, "any dispute involving the proper application or interpretation of this Agreement", and secondly, "a claim that an employee has been unreasonably and unjustly discriminated against". Thornal's grievance was clearly one of the first type: It was a grievance over the proper application of the Agreement to Thornal, with regard to the Company's determination of his "ability, skill and qualifications". There was nothing whatsoever mysterious about the grievance, and it was clearly one contemplated by the Agreement. The Fifth Circuit Majority, however, completely denied Thornal and the Union's right to bring this Grievance, as a result of a totally unexplained misinterpretation of the grievance provision of the Contract.

As a result, we have a result here that is premised upon a clear mistake in contractual interpretation on the part of the Fifth Circuit Majority. That much, alone, is a reasonable basis to reverse that decision. However, the more glaring problem with the Fifth Circuit Majority Opinion is that it indulged in such an analysis in the first

instance. The Fifth Circuit Majority Opinion wrongly limits, if not totally destroys, the grievance right of employees covered by this Collective Bargaining Agreement; the Fifth Circuit's clear violation of long-standing precedent of this Court, however, lies in the fact that it indulged in a comparative analysis between multiple contractual provisions, and thereby ultimately replaced its interpretation of the Contract, and thus its judgment regarding the merits of the underlying dispute, for that of the Arbitrator. This action of the Fifth Circuit Majority Opinion is clearly not allowed by the decisions of this Court, and conflicts with decisions of all Circuit Courts, including the Fifth Circuit.

The fundamental question before the Fifth Circuit was merely whether or not the Award of Arbitrator King "drew its essence" from the Collective Bargaining Agreement. See *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied,* 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). In order to accomplish this task, all that the Circuit needed to do was to look at the grievance and arbitration provision of the Contract, and in particular, Article II, Section 4 thereof, which is the only provision that places limitations upon, or otherwise

defines, the role of the Arbitrator under this Collective Bargaining Agreement. Had the Fifth Circuit limited itself to such an examination, it would have seen that the only limitation upon the authority of the Arbitrator within the Contract was that he or she did "not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof." Manifestly, Arbitrator King did none of these things. He merely resolved a dispute over the Company's determination of an employee's "ability, skill and qualifications", as specifically authorized by Section 7 of the Contract.

Moreover, had the Circuit limited its examination of the Contract, to only that as necessary to resolve the sole question of whether the Arbitrator's Award "drew its essence" from the Collective Bargaining Agreement, it would have seen that the Contract, in typical fashion, stated simply that "the sole function of the Arbitrator shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement. . ." Again, this is precisely what the Arbitrator did: He took and resolved the disputes placed before him, which were disputes over the "proper application and interpretation of this Agreement", and he

determined that in one instance, the Company was correct, and in the other, the Union was correct.

Unquestionably, had the Fifth Circuit Majority limited its examination, as long standing precedent of this Court clearly directs it to do, to an examination of any limitation upon, and any definition of, the authority of the Arbitrator under the Agreement, the Circuit Court would have seen that Arbitrator King acted fully within his authority, and within the limitations on his authority, and seeing this, the Fifth Circuit examination of the issue should have ended there. Unfortunately, it did not; rather, the Circuit went beyond the limited examination that the precedent of this Court allows, and indulged in extensive contractual analysis, including comparative analysis of multiple contractual provisions, and ultimately reached conclusions that lead it to vacate the Arbitration Award.

The contractual analysis engaged in by the Fifth Circuit was clearly wrong; the analysis was faulty and produced a complete misinterpretation of the Collective Bargaining Agreement. However, such is not where the real error of the Circuit exists in this case; its error was not in its faulty and poorly reasoned contractual analysis;

its error was in indulging in the analysis in the first instance.

Acting under the guise of determining the question of whether or not Arbitrator King's Award "drew its essence" from the Collective Bargaining Agreement, the Fifth Circuit Majority undertook the job of the Arbitrator; the Fifth Circuit interpreted contractual provisions which were presented to the Arbitrator for resolution, and should not have been reinterpreted by the Court of Appeals. In the final analysis, the result was a complete usurpation on the part of the Fifth Circuit Court of the authority of the Arbitrator, and an ultimate substitution by the Circuit Court of its judgment with regard to the merits of the dispute for that of the Arbitrator.

There can be no question but that this action of the Fifth Circuit is error, and clearly at odds with long-standing precedent of this Court. Moreover, the analysis of the Fifth Circuit, and the manner in which it went about its reasoning leading to its ultimate decision, not only has had the effect of totally emasculating the grievance procedure of the Petitioner Union, but it also, if allowed to stand, has the potential effect of doing the same to grievance procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit. This

Opinion of the Fifth Circuit is not only wrong, and totally contrary to long-standing precedent of this Court, but it has the very dangerous and real potential of producing more and continual decisions which will effectively undermine the fundamental concept of arbitration as being the favored method of resolving labor disputes. For that reason, this case merits the consideration of this Court, and ultimately the action of this Court in reversing the decision of the Fifth Circuit.

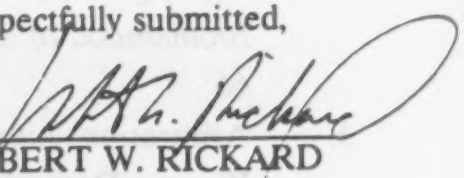
CONCLUSION

Sam Thornal was laid off from his job as a result of his employer's determination of his "ability, skill and qualifications". The Collective Bargaining Agreement that covered his employment with his employer authorized him to grieve this determination of his "ability, skill and qualifications". He and his Union did that, and this grievance was ultimately presented to an Arbitrator for resolution. That Arbitrator resolved the dispute, by concluding that the Company was not correct in its determination of Thornal's "ability, skill and qualifications", and that in fact, his "ability, skill and qualifications" were "equal" with at least one employee of lessor seniority who was not laid off. As a result, the Arbitrator applied the contractual seniority clause, and directed the Company to reinstate the Grievant.

Subsequently, a lawsuit was filed, and the dispute came before a Judge of the United States District Court for the Southern District of Texas. Judge Norman Black, analyzing the case consistent with long-standing precedent of the United States Supreme Court, concluded that the Arbitrator's Award "drew its essence" from the Collective Bargaining Agreement. The case then came before the United States Court of Appeals for the Fifth Circuit,

which had it limited its examination in accordance with Supreme Court precedent, would have reached the same conclusion. However, the Fifth Circuit assumed the role of the Arbitrator, and indulged in extensive analysis and interpretation of the contractual language, and the underlying dispute, and ultimately substituted its judgment for that of the Arbitrator. That decision, being totally at odds with the teachings of this Court, cannot be allowed to stand.

Respectfully submitted,



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LIST OF APPENDIX

1. Decision of the United States Court of Appeals for the Fifth Circuit in No. 94-20693; *The Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, entered on December 11, 1995.
2. Final Order issued by Judge Norman W. Black on August 25, 1995, in the United States District Court for the Southern District of Texas, Houston Division in Civil Action No. H-94-908; *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*
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4. Order denying Petition for Hearing issued on January 8, 1996 in No. 94-20693; *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, In the United States Court of Appeals for the Fifth Circuit.
5. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.
6. Section 203(d) of the Labor Management Relations Act, 29. U.S.C. §173(d)